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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL SILVA,

Defendant and Appellant.

E065151

(Super.Ct.Nos. RIF1210288,
RIF1210637, RIF1303719)

OPINION

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge.

Affirmed.

Randi Covin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Arlene A. Sevidal, Collette C. Cavalier, and Minh U. Le, Deputies Attorney General, for Plaintiff and Respondent.

A jury convicted defendant Michael Silva of second degree murder (Pen. Code, § 187, subd. (a))¹ on an implied malice theory. The charge arose from a fatal shooting occurring when defendant, under the influence of methamphetamine, was handling a loaded firearm that discharged, killing Florinda Hernandez (the victim). Defendant was also convicted of being a felon in possession of a firearm (§ 29800, subd. (a)(1)) and being under the influence of a controlled substance while personally possessing a loaded, operable firearm (Health & Saf. Code, § 11550, subd. (e)). The jury found true that he personally used a firearm in the commission of the murder. (§§ 1192.7, subd. (c)(8), 12022.53, subd. (b).) In a bifurcated proceeding, the trial court found that defendant had three prison priors (§ 667.5, subd. (b)), a prior strike (§§ 667, subd. (c), (e)(1), 1170.12, subd. (c)(1)), and that he committed the offenses while out on bail (§ 12022.1). On January 4, 2016, defendant was sentenced to 30 years to life for second degree murder, plus a determinate 19 years.²

In this appeal, defendant contends his second degree murder conviction must be reversed, because insufficient evidence shows he acted with implied malice at the time of the fatal shooting. He further contends the evidence is insufficient to support the personal use of a gun enhancement. We reject his contentions and affirm.

¹ All statutory references are to the Penal Code unless otherwise indicated.

² On the same day, defendant pled guilty in case No. RIF1210288 to possession of a controlled substance (Health & Saf. Code, § 11370.1) and he was sentenced to one year in prison, to run consecutive to his sentence in the murder case. He also pled guilty in case No. RIF1210637 to possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)), and he was sentenced to eight months in prison, to run consecutive to his sentence in the murder case.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the evening of March 20, 2013, defendant and the victim, a friend, were working on defendant's car; various people were going in and out of the garage. One of defendant's housemates, Jeannette, and her boyfriend, Josh, came home around 10:45 p.m. and went into the living room. At some point, defendant came into the living room from the garage, holding a "meth pipe." Defendant told Jeanette that he "was probably going to get some sleep that night because he had been up for about three days."

Later that night, Jeanette and Josh went outside to the driveway, where they had an argument. Once they got inside Josh's car, Jeanette heard a gunshot from inside the house. After hearing the gunshot, Jeanette saw defendant and the victim come out of the house through the front door. The victim was bent over, leaning on defendant while he assisted her. Defendant helped her into the backseat of Josh's car and had her sit on his (defendant's) lap. Defendant told Josh to drive to the hospital. During the drive, defendant was screaming the victim's name while the victim was foaming at the mouth, struggling to breathe. Jeanette gave Josh directions to the hospital, but because she was scared, they got lost on the way. When they arrived, defendant told Jeanette, "if the police . . . ask where the shooting happened . . . tell [them] it was at the 99 Cent Store."

Josh dropped off defendant and the victim near the main lobby of the Corona Regional Medical Center, but not at the emergency room. A security guard at the hospital testified that when he made contact with them in the parking lot, he heard defendant tell the victim the bullet was meant for him, not her. Defendant did not call 911 until he was at the hospital. While the victim was being treated, defendant told the

security guard that he and the victim had been walking down the street when a vehicle pulled up next to them. Someone inside the car yelled a derogatory statement at the victim, defendant responded, and the person in the vehicle pulled a gun out and shot her. Defendant explained that the bullet was meant for him. Defendant's speech was slurred and he spoke rapidly and nervously.

Defendant told a substantially similar story to the police. He further elaborated that the shooting took place "at the 99 Cent Store"; he brought the victim to the hospital on foot, and the shooter was in a black Silverado. When asked if he lived in Corona, defendant said he was homeless. His speech was "rapid," in addition to mumbling and breathing heavily. He told the officers that he felt dizzy and numb, and he soon became unresponsive. While defendant was treated at the hospital, he told one of the nurses that he had used methamphetamine. He slept at the hospital, during which time his heart rate was monitored and recorded: At 2:30 a.m., it was 145 beats per minute; at 3:15 a.m., it was 120 beats per minute; at 3:40 a.m., it was 122 beat per minute. Defendant's blood was drawn at 4:04 a.m. While he was asleep, his eyelids fluttered and his pupils were dilated. Gunshot residue was found on defendant's right hand.

The victim was pronounced dead at the hospital at 1:37 a.m. She died from the gunshot wound, which caused her to "[bleed] to death internally and externally." The bullet's trajectory was "pretty much . . . straight on front to back, very minimally slightly downward." The coroner who performed the victim's autopsy agreed that the wound was consistent with two people standing and one shooting the other in the chest. The bullet trajectory's "[v]ery, very slight downward angle" could have resulted from a "slight bend

at the waist, at the hip.” Even normal posture could give the bullet a slight downward angle. The coroner further explained that the victim’s wound was “potentially life-threatening,” but that “if medical intervention is provided in a timely fashion, the expected outcome is most people, the majority will survive this particular type of injury.”

The next morning, another of defendant’s housemates, Aaron, went into the garage and saw a handgun with a laser attachment lying on the workbench. He picked up the gun and put it in defendant’s car, on the front passenger seat. Mariela, yet another of defendant’s housemates, told Aaron that they should “get the ‘fuck out of [the house].”” Later that morning, Aaron saw Mariela in defendant’s car, which was still in the garage. She was sitting in the driver’s seat, wearing blue gloves, and talking on the phone. Mariela was looking for money and the gun. Once she found the gun, she put it in her bag. The bag and gun were later retrieved from inside her car. There was no bullet chambered in the gun, but it had a magazine with nine unspent rounds in it.

The owner of the gun used to kill the victim testified that it had been stolen from her home on March 20, 2013. She kept the gun loaded with a 10-round magazine, but she did not put a round in the chamber so that it was ready to shoot.

Defendant tested positive for methamphetamine in his system when he was arrested, and he exhibited symptoms of being under the influence. The prosecution’s expert witness testified that methamphetamine is a “central nervous system stimulant, which means that it works on the brain and the body by speeding everything up.” The drug also causes involuntary physical responses, including muscle tremors or rigidity and uncontrollable, unsteady, fidgety movements. Mentally, the drug increases “risk-taking

behavior, [in that] a person may engage and make decisions that [he] wouldn't normally have done if [he] were not under the influence of the drug." Other symptoms include a sustained elevated pulse rate, rapid speech, and dilated pupils. Continued use of methamphetamine after the body has already been stimulated by prior use may result in someone being in the "crash phase" in which signs of both stimulation and slowing down are present.

The gun used by defendant was a semiautomatic handgun. The prosecution's expert, a forensic firearms examiner, testified that the gun can hold a maximum of 11 rounds, 10 in the loaded magazine and one round in the chamber. The gun was found with a mounted laser sight. The expert stated that its "loaded chamber indicator" shows whether "there is a cartridge inside the chamber ready to fire." If a cartridge is loaded, "you can see the silver of the cartridge"; if there is no cartridge, "it's just empty, it's just black." Further, the gun has several safety mechanisms: a trigger safety, which prevents the gun from firing unless the bottom half of the trigger is pulled; a magazine safety, which requires a magazine be loaded whether or not a bullet is in the chamber; and an internal firing pin safety, which requires the trigger be pulled in order to fire. All safeties were working properly on the gun.

Defendant testified that he was working in the garage on the day of the shooting when an acquaintance he knew only as "Bones" approached him, offering to sell him a gun. When she showed him the gun, she removed the loaded magazine. He purchased the gun from her, including its magazine. He then put the gun away, assuming it was not

loaded. Defendant admitted that he had smoked methamphetamine at 5:00 or 6:00 p.m. that day.

Later that night, defendant and the victim were in the garage, working on his car. The victim occasionally left the garage to get them a drink. At one point, defendant told the victim to “go inside, wash up” so they could go out to eat. Once she left the garage, defendant turned off the main lights, leaving on the light at the work bench. Using that light, he picked up the gun and attached the laser. He held the gun upside down in his left hand, with his hand partially on the slide of the gun. As he was attaching the laser to the gun with his right hand, two of his fingers “came off the caliper buttons, overrode the trigger guard . . . hit the trigger,” and the gun fired. The gun then “kicked out” of defendant’s hand. He noticed the victim standing in the garage. She looked at him with one of her hands over the wound. Defendant opened the garage door, picked her up, and ran outside to the driveway. He noticed Josh in his car and ran toward it. Jumping into the backseat with the victim, defendant told Josh and Jeanette to take them to the hospital. When they arrived at the hospital, Jeanette helped defendant take the victim out of the car. Josh drove off and Jeanette ran after him. Defendant realized Josh had dropped them off near the main lobby doors (not the emergency room) and called 911. A security guard soon approached him and called for help. Two medical teams arrived and worked on the victim.

Defendant admitted that he lied to the security guard and the police about how the victim was shot. He acknowledged there was no spent casing found and there was no evidence (other than his testimony) as to where the shooting occurred. He testified that

he did not intentionally shoot the victim and that he had never taken a course on firearm safety. He also explained that he did not know there was a round in the chamber. He assumed the gun was not loaded. He stated that he did not know he was endangering someone's life when he was attaching the laser to the gun. When asked whether he thought it was a good idea to handle a gun while under the influence of a drug, defendant said, "[N]o, it's not, I would say." He also agreed that guns can be dangerous, guns are deadly weapons, and "guns and drugs don't mix." Defendant could not remember where the victim was standing after he shot her, but he knew she was in the garage before the gun went off.

Witnesses testified as to defendant's repeated use and possession of guns. Defendant testified that he used a gun in 1989 when he fired at a car with people in it. In January 1991, he admitted to a police officer that the semiautomatic handgun in the car he was in belonged to him. In November 1991, defendant had a rifle and a semiautomatic pistol in his possession and told a police officer that he needed them for protection. In August 1992, defendant was convicted of being a felon in possession of a firearm. In June 1998, defendant owned a shotgun and a box of shotgun rounds. His girlfriend at the time owned an "SK 47," and 120 rounds of ammunition. In April 2008, police found an "AR 15 rifle" and a semiautomatic handgun, both of which were loaded, in defendant's home. The loaded semiautomatic handgun was in his bedroom. Defendant also had a loaded semiautomatic pistol in his car. Defendant admitted that all the guns found in his possession were loaded "pretty much every time." The day after he shot the victim, March 21, 2013, police found various types of ammunition in his

bedroom. In addition, defendant admitted going to and shooting at gun ranges. He also admitted knowing how a semiautomatic handgun works and how to load it.

When defendant was attaching the laser, he did not check its chamber, nor did he pull out the magazine or check to see if there were bullets in the magazine. He believed the gun was unloaded because he had not seen Bones load it or put a bullet in the chamber, and the last time he looked there was no bullet in the chamber. Defendant did not look at the loaded chamber indicator on the slide of the gun, claiming he did not know there was one. He admitted he knew that shooting people with a gun could kill them.

During the prosecution's rebuttal, the prosecution's expert responded to a hypothetical in which the prosecutor described a person holding a gun in a way similar to that described by defendant, i.e., upside down while attaching the laser. The expert testified that a person who grabbed a semiautomatic firearm such as that "upsidedown," with his hand partially on and partially off the slide, would injure his hand if the gun fired and flew out of his hand. He explained that "the bottom of the slide has a sharp edge," such that if the gun flew out of the person's hand, it would tear his hand. There was no evidence that defendant's hand was injured as a result of shooting the victim.

II. DISCUSSION

A. Substantial Evidence Shows Defendant Acted with Implied Malice.

Defendant claims his second degree murder conviction must be reversed because there is insufficient evidence he acted with implied malice. Specifically, he argues that

the evidence fails to show that he knew and disregarded the fact that his conduct endangered human life. We disagree.

1. Standard of review.

““When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.]”” (*People v. D’Arcy* (2010) 48 Cal.4th 257, 293.)

2. Applicable legal principles.

Second degree murder is an unlawful killing with malice aforethought, but without the willfulness, premeditation, and deliberation necessary for first degree murder.

(§§ 187, subd. (a), 189; *People v. Superior Court (Costa)* (2010) 183 Cal.App.4th 690, 697.) By contrast, involuntary manslaughter is an unlawful killing without malice “in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” (§ 192, subd. (b); see *People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1082.) For purposes of the general murder statutes (§§ 187-189), malice may be express or implied (§ 188). “Malice is implied when the killing is proximately caused by “an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of

another and who acts with conscious disregard for life.” [Citation.]” (*People v. Knoller* (2007) 41 Cal.4th 139, 143.)

An accidental shooting can be second degree murder or involuntary manslaughter depending on the defendant’s knowledge. (See *People v. Thomas* (2012) 53 Cal.4th 771, 814-815 [conviction for second degree murder for a claimed accidental shooting during an argument]; *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1141-1142.) The mental state for involuntary manslaughter differs from the mental state for implied malice murder. “‘Implied malice contemplates a subjective awareness of a higher degree of risk than does gross [(i.e., criminal)] negligence, and involves an element of wantonness which is absent in gross negligence. [Citations.]’ [Citation.] ‘A finding of gross negligence is made by applying an *objective* test: if a *reasonable person* in defendant’s position would have been aware of the risk involved, then defendant is presumed to have had such an awareness. [Citation.] However, a finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard. [Citation.]’ [Citation.]” (*Id.* at p. 1142; *People v. McNally* (2015) 236 Cal.App.4th 1419, 1426 [“‘the state of mind of a person who acts with conscious disregard for life [(i.e., implied malice)] is, “I know my conduct is dangerous to others, but I don’t care if someone is hurt or killed.”’”].)

3. Analysis.

Substantial evidence shows that defendant was aware that handling a loaded gun while under the influence of methamphetamine, in the presence of others, was dangerous but he consciously disregarded the risk. According to the testimony, several people,

including the victim, were going in and out of the garage. At the time defendant was handling the gun, he was awaiting the victim's return so they could go get something to eat. He was under the influence of methamphetamine; nonetheless, he turned off the main lights, picked up the gun with the loaded magazine, and attached the laser using only the light from the workbench. He was aware the victim had returned to the garage but he continued handling the gun. The forensic firearms examiner testified that the gun had a chamber indicator, which shows that a bullet was in the chamber and ready to be fired. Defendant did not unload the weapon while attaching the laser, or check to see if it was loaded. Rather, he claimed that he assumed it was not. However, defendant admitted that all the guns found in his possession were loaded "[p]retty much every time." After shooting the victim, defendant had Jeannette and Josh drive them to the hospital instead of calling 911. At the hospital, defendant lied about how and where the victim was shot, and claimed that he was homeless. A reasonable jury could reject defendant's claim of ignorance about the gun being loaded, given his actions and lies after shooting the victim. Based on the record, substantial evidence supports the jury's conclusion that defendant was aware of but disregarded the risk he posed to the victim when he knowingly handled a loaded gun while on drugs.

Distinguishing several cases, defendant contends that no reasonable trier of fact could have found beyond a reasonable doubt that he acted with implied malice at the time of the shooting, because the evidence fails to show that he was subjectively aware he was endangering the victim's life when he was attaching the laser to the gun while under the influence of methamphetamine. He makes several assertions: he did not know the gun

was loaded; he had no prior training in firearm safety; his failure to check and make certain that the gun was unloaded establishes criminal negligence only; he thought he was alone in the garage when he was handling the gun; there was no conflict between him and the victim; and he demonstrated concern for her after she was shot.

Defendant's assertions of fact, even if we assume them to be supported by the evidence, are not enough to establish that reversal is required. ““Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. “If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” [Citations.]” [Citation.]’ [Citations.]” (*People v. Cravens* (2012) 53 Cal.4th 500, 507-508.) Because the jury could reasonably find that defendant was aware of, but disregarded, the risk he posed to the victim when he knowingly handled the loaded gun while on drugs, substantial evidence supports the judgment. Defendant's lack of gun safety training and his attempt to help the victim after the shooting are ““merely circumstances to be considered in evaluating [his] culpability.”” (*People v. Ortiz* (2003) 109 Cal.App.4th 104, 115 [evidence of a defendant's experience and actions provide the knowledge component of implied malice].) That he had previously engaged in this same dangerous activity numerous times without incident is irrelevant because the fact that

nothing serious happened may be attributed to sheer luck, which is insufficient to excuse his behavior.

The jury found that defendant acted with implied malice. Substantial evidence supports the jury's finding.

B. Substantial Evidence Supports Defendant's Personal Use of a Gun Enhancement.

Defendant contends the evidence is insufficient to show that he personally used a firearm within the meaning of section 12022.53, subdivision (b). We disagree.

1. Standard of review.

We review the entire record to determine whether it contains substantial evidence from which the jury could find defendant guilty beyond a reasonable doubt. (*People v. D'Arcy, supra*, 48 Cal.4th at p. 293.)

2. Applicable legal principles.

"Section 12022.53 is part of the so-called 10-20-life law enacted in 1997 to enhance penalties for firearm use in the commission of certain felonies [citation]." (*People v. Grandy* (2006) 144 Cal.App.4th 33, 42.) The section recognizes different degrees of culpability and imposes three gradations of punishment based on increasingly serious types and consequences of firearm use in the commission of designated felonies. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 495.) "[S]ection 12022.53, subdivisions (b) and (c), require that the defendant personally use or discharge a firearm in the commission of the underlying felony." (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1058.) Murder is a specified felony. (§ 12022.53, subd. (a)(1).) The phrase "uses

a firearm,” as found in section 12022.53, subdivision (b), encompasses the display of an unloaded or inoperable firearm. “[A] defendant ‘uses’ a firearm by intentionally displaying it in a menacing manner, firing it, or striking or hitting a human being with it. [Citation.]” (*People v. Grandy, supra*, at p. 42.)

3. Analysis.

Substantial evidence exists to support the jury’s true finding of personal use of a firearm enhancement. Prior to attaching the laser to his new gun, defendant turned off the main lights in the garage, using the only the light by the workbench. When the victim returned to the garage, defendant was in handling a loaded gun with the laser attached in a darkened garage. According to the coroner, the bullet that killed the victim had an essentially straight trajectory with only a “[v]ery, very slight downward angle.” Its path could have resulted from a person standing in a normal posture and shooting her in the chest. Although defendant testified that the shooting was an accident, the jury could have chosen to disbelieve his testimony, given his extensive experience with guns, his actions and repeated lies at the hospital, Mariela’s attempt to remove the gun from the residence, and the absence of any spent casing in the garage. Instead, it was reasonable for the jury to find that defendant wanted to try out his gun using the laser, and so he darkened the garage, used the laser to aim the gun at the victim, and pulled the trigger. Even if defendant believed the weapon was not loaded, this scenario supports a finding he

intentionally displayed the gun in a menacing manner. (*People v. Grandy, supra*, 144 Cal.App.4th at p. 42.)

III. DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

MILLER

J.

SLOUGH

J.